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February 7, 1997

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

RE: Newspaper/Radio Cross-Ownership Waiver Policy
MM Docket No. 96-197
Comments of Tennessee Association of Broadcasters

Dear Mr. Caton:

Transmitted herewith, on behalf of the Tennessee Association of Broadcasting, are an original and eleven (11) copies of its comments in the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate directly with this office.

Very truly yours,

FLETCHER, HEALD & HILDRETH, P.L.C.

J. Todd Metcalf

J. Todd Metcalf *
Counsel for Tennessee Association of Broadcasters

Enclosures

* Formal admission to the bar on oath pending.

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
	)	
Newspaper/Radio Cross-Ownership Waiver Policy	)	MM Docket No. 96-197
	)	
	)	
	)	

To: The Commission

COMMENTS OF THE TENNESSEE ASSOCIATION OF BROADCASTERS

I. INTRODUCTION

The Tennessee Association of Broadcasters ("TAB"), by its attorneys and pursuant to Section 1.415 of the Commission's rules, hereby submits these Comments in response to the *Notice of Inquiry* ("*NOI*") in MM Docket No. 96-197, FCC 96-381 (released October 1, 1996).

The Tennessee Association of Broadcasters was founded in 1948 to represent the interests of broadcast licensees in all broadcast media throughout the state of Tennessee. TAB is an I.R.C. Section 501(c)(6) non-profit, tax-exempt trade organization committed to advocating positions in the best interests of broadcast licensees in Tennessee. TAB's membership is currently comprised of 170 radio and television stations in all parts of the state, urban and rural, and commits itself to being the "eyes, ears, and voice of the industry" in Tennessee. TAB therefore has a vested interest in the policy decisions of the Commission affecting the broadcasting industry.

In these Comments, TAB opposes the liberalization of the Commission's Newspaper/Radio Cross-Ownership Waiver Policy because of the harmful impact on viewpoint diversity and competition that would result from such a change of course, particularly in smaller markets. The members of TAB for the most part are licensees with broadcast interests in small markets with less than five radio stations, one weekly or daily newspaper, and no local television station. Thus, in these markets, it is easy to see that the liberalization of the waiver policy would run directly contrary to the twin goals upon which the rule rests, namely "promoting diversity of viewpoint and economic competition."[1] While the "top 25/30" or "top 50/30" paradigms may represent a reasonable modification of the current restrictive waiver policy, further expansion of the policy to permit waivers in small markets, except in the most exigent circumstances, fails to reflect the realities, economic and otherwise, facing radio broadcast stations in those markets and thereby represents a particularly dire threat to broadcast stations in small markets and the public they serve.

II. LIBERALIZING THE WAIVER POLICY, PARTICULARLY IN SMALLER MARKETS, WOULD HAVE POTENTIALLY DEVASTATING EFFECTS ON VIEWPOINT DIVERSITY.

To begin with, in smaller markets, there is already a dearth of viewpoint diversity. There are relatively few media outlets, and thus the number of different viewpoints from which the public may select is severely limited. In Tennessee, for example, there are one hundred fifty-four (154) communities of license for broadcast radio stations.[2] Of those 154 communities, only twenty-five have daily newspapers, and those twenty-five include the state's five largest markets--Memphis, Nashville, Knoxville, Chattanooga, and the Tri-Cities (Bristol, Johnson City, Kingsport). Of the remaining eighteen cities or markets with daily newspapers, only four have more than four radio

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[1] Notice of Inquiry, Newspaper/Radio Cross-Ownership Waiver Policy, MM Docket No. 96-197, FCC 96-381, at para. 3 (*citing* Multiple Ownership of Standard FM and Television Broadcast Stations, Second Report and Order, 50 FCC 2d 1046, 1074 (1975) ("*Second Report and Order*").

[2] BROADCASTING AND CABLE YEARBOOK --- (1996).

stations,[3] and twelve have AM/FM combination broadcast stations owned by the same licensee. Moreover, in the top four markets, there are fifty-two total stations controlled by twenty-five licensees.[4] With the new duopoly rules in place, this decrease in viewpoint diversity is certain to become more rather than less common, and thus one of the twin goals of the waiver policy is already threatened. If the Commission elects to become more permissive with the newspaper/radio waiver policy, another voice, in addition to those already subsumed by the group owners so prevalent in broadcasting today, will be silenced by the purchasing newspaper.

The Commission has made clear that one of its primary goals is ensuring that communities of license are afforded diverse viewpoints to enhance our republic's democratic process by informing and involving citizens in the events of their particular communities. Justice Holmes, in one of his most persuasive opinions, exalted the value of viewpoint diversity by arguing that the only sure way to determine the value of an idea is to examine its viability in the "marketplace of ideas."[5] To liberalize the waiver policy seriously jeopardizes the trade in ideas and viewpoints that it is the Commission's stated goal to enhance. In smaller markets, like the majority of those in Tennessee and nationally, such a relaxation would potentially result in a near monopolization of available

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3 *Id.*

4 Statistics provided by the Radio Advertising Bureau from *Duncan's Radio Market Guide* (1996).

5 Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting). Justice Holmes concluded

> . . . that the ultimate good to be desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market and that truth is the only ground upon which their wishes safely can be carried out.

Id.

viewpoints on matters specific to the community of license. Such a consequence surely cannot be labeled a "public benefit," and thus, it is the obligation of the Commission to protect against it.[6]

Therefore, while the Commission might reasonably consider relaxing the waiver policy within large markets with a host of media voices, it cannot do so in smaller markets and remain true to the public interest. In the largest markets, i.e., those that fall into the "top 25/30" or "top 50/30" paradigms, allowing waiver of the cross-ownership restriction may in some instances enhance the availability of diverse viewpoints. For example, as the Commission notes in the *NOI*, there would likely be no adverse impact on the trade in ideas in a market where a newspaper is failing and the only prospective purchaser is the owner of a local broadcast station, whether radio or television.[7] Indeed, the survival of the newspaper, or the broadcast outlet, might even lead to an aggregate increase in the dissemination of news and information in the relevant local market. Nevertheless, in a community with comparatively few independent voices--broadcast or published--the calculus is necessarily different. In a small market, with a single daily newspaper and three radio broadcast stations, allowing the sale of an AM/FM combination to the local newspaper leads to a concentration

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[6] Congress has also spoken clearly on this subject. In the *NOI*, at paragraph 6, the Commission states:

> [The] legislative history indicates an intent that such 'new policy allow such waivers [of the newspaper/radio cross-ownership restrictions] to be granted only in the top 25 markets [with] at least 30 [remaining] independent broadcast voices' provided that the Commission make 'a separate affirmative determination that [the transaction] is otherwise in the public interest, based upon the *applicant's showing that there are specified benefits to the service provided to the public sufficient to offset the reduction in diversity which would result from the waiver.*

NOI, supra, at para. 6 (citing House Report 103-293, 103rd Cong. 1st Sess., p. 2 (1993)) (emphasis supplied).

[7] *See, e.g.,* Fox Television Stations, Inc., 8 FCC Rcd 5341 (1993), *aff'd sub nom.*, Metropolitan Council of NAACP Branches v. FCC, 46 F.3d 1154 (D.C. Cir. 1995).

of control that is detrimental to the public's interest in diversity.

III. LIBERALIZATION OF THE WAIVER POLICY WILL NECESSARILY WEAKEN THE ALREADY PRECARIOUS COMPETITIVE POSITION OF RADIO BROADCAST STATIONS RELATIVE TO NEWSPAPERS AND THUS CONTRAVENES THE COMMISSION'S MANDATE TO ENCOURAGE A COMPETITIVE BROADCAST MARKETPLACE.

As an initial matter, and as the Commission notes in the *NOI* at paragraph 20, daily newspapers tend to be much larger enterprises than either television or radio stations. In addition, as is true of all but two of the twenty-five Tennessee markets with daily newspapers, there tends to be one daily newspaper in a community with multiple broadcast media outlets. Consequently, newspapers enjoy a comparatively enviable position as the kingpin of media revenue along with having the advantage typically of considerable economies of scale. This combination makes newspapers particularly strong competitors for revenue in the communities where they are located. Consider the following. In 1995, nationally, local newspapers captured fully 49% of local advertising dollars (20.1% of all advertising) as compared with a total of 13.3% of local advertising (5.5% of all advertising) captured by radio stations.[8] These statistics make abundantly clear the formidable economic position local newspapers occupy, particularly in small communities. Add to those facts that the 49% share is usually captured by one newspaper while the 13.3% radio share is generally divided among multiple radio stations, and newspapers appear almost menacing.[9] This can

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[8] McCann-Ericson, *U.S. Advertising Volume*, ADVERTISING AGE, May 20, 1996.

[9] Knoxville, Tennessee, for example, has one daily newspaper, the *Knoxville News-Sentinel*, and fourteen broadcast stations. From September 1995 through September 1996, the *News-Sentinel* captured $48,700,000, or 38.1%, of media revenue, while the eleven commercial radio stations collectively captured only $21,500,000, or 16.8%, of media revenue. Such ratios are common throughout the nation. *Duncan's Radio Market Guide* (1996).

be exacerbated to the point of predation, particularly in smaller markets with a single daily newspaper and few radio stations. TAB opposes the liberalization of the waiver policy for just that reason.

Of the twenty-five communities of license in Tennessee with daily newspapers, Dyersburg offers a good example of what could happen in smaller markets if the waiver policy were relaxed. Dyersburg has three broadcast radio stations, two FM and one AM, and a single daily newspaper, the *State Gazette*. Two of the radio stations, an AM/FM combination, are owned by a single licensee, a typical scenario in smaller markets nationwide. If the waiver policy were liberalized and expanded to reach beyond the largest markets, in theory, the publisher of the *State Gazette* could apply for and be assigned the licenses of the AM/FM combination. As a result, a single owner would control three of the four media outlets in the community. Leaving aside the serious viewpoint diversity concerns raised by this hypothetical, the anti-competitive consequences of this transaction are alarming. Such a combination could underprice its only competitor to the point of driving it out of business. Once it succeeds in phase one, the publisher/broadcaster would control fully 100% of the media outlets for local advertising and could employ its market dominance to increase its advertising prices and its own profits. While this assumes unbridled avarice on the part of the publisher/broadcaster, the sheer volume of antitrust cases in the reporters indicates such undue concentrations of economic power are not uncommon. Even if the publisher/broadcaster did not or could not drive his competitor out of business, it could use its sheer market power to dramatically improve its business by integrating his advertising operations. In smaller markets, the restriction against newspaper/radio cross-ownership is particularly necessary to protect both the broadcaster's investment and the public's interest.

In sum, TAB urges the Commission to retain its ban on newspaper/radio cross-ownership in smaller markets. To liberalize the waiver policy would have far-reaching and potentially devastating effects on both viewpoint diversity and economic viability, the two primary goals upon which it is based. In smaller markets in particular, relaxing the waiver policy could have dramatically negative consequences.

WHEREFORE, consistent with the stated will of Congress, it is the position of the Tennessee Association of Broadcasters that the current stringent newspaper/radio cross-ownership policy should not be relaxed except in the context of "top 25/30" or "top 50/30" waiver requests which affirmatively show sufficient public interest benefits to offset the reduction in viewpoint diversity and potential anti-competitive effects of the waiver.

Respectfully submitted,

TENNESSEE ASSOCIATION OF BROADCASTERS

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